No. 18-389

IN THE
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. STRAUSS
Counsel of Record
ARIS E. KARAKALOS
STRAUSS & STRAUSS, APC
121 North Fir Street, Suite F
Ventura, California 93001
(805) 641-6600
(mike@strausslawyers.com)

Counsel for Respondent

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QUESTION PRESENTED

Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), all civil and criminal laws of the adjacent state become surrogate federal law on installations on the Outer Continental Shelf ("OCS"), but only "to the extent that they are applicable and not inconsistent with" applicable federal law. In the decision below, the Ninth Circuit, relying on precedent of this Court and using a test that is substantially the same as those used in OCSLA cases by the First and Fifth Circuits, held that California minimum wage and overtime laws are adopted as surrogate federal laws on the OCS because they are applicable, in that they pertain to the subject matter of the parties' dispute, and not inconsistent with potentially applicable federal laws, in that the Fair Labor Standards Act ("FLSA") permits the co-existence of state and other federal laws that provide greater minimum wage and overtime protections than the FLSA. In so holding, the Ninth Circuit rejected the district court's reliance on a 1969 maritime decision by the Fifth Circuit in *Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Association*, 417 F.2d 1030 (5th Cir. 1969), which suggested in dicta that a state law would not apply on the OCS unless it was needed to fill a significant void or gap in federal law.

The question presented is:

Whether the Ninth Circuit, applying a test that is in harmony with decades-long precedent in the Supreme Court and the Fifth and the First Circuits, correctly concluded that California minimum wage and overtime laws become surrogate federal law on the OCS because they pertain to the subject matter at

hand and are not inconsistent with federal law, since the FLSA, through its savings clause, 29 U.S.C. § 218(a), expressly permits states and other federal statutes to supplement the FLSA's minimum wage and overtime laws with more protective standards.

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INTRODUCTION

This case involves the application of California minimum wage and overtime laws to the workers on the 23 oil platforms off the coast of Southern California on the Outer Continental Shelf ("OCS"). In the decision below, the Ninth Circuit held that California minimum wage and overtime protections extend to the workers on those platforms by virtue of the choice-of-law provision of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(a)(2)(A), which imports the non-taxation laws of the adjacent states as surrogate federal law to platforms on the OCS to the extent the state laws are "applicable and not inconsistent" with federal law. The opinion below found that these California laws were "applicable" because they pertained to the subject matter of the parties' dispute and that they were "not inconsistent" with federal law, because the state minimum wage and overtime laws provide greater protection than the minimum wage and overtime provisions of the Federal Fair Labor Standards Act ("FLSA"), which, through its savings clause, explicitly contemplates the co-existence of other state or federal laws that provide such greater protections.

The Petition should be denied for several reasons.

First, there is no circuit split. All three circuits to have addressed the issue of when a state law becomes surrogate federal law under section 1333(a)(2)(A) have adopted substantially the same test. Pet. App. 15-16; *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 194 (1st Cir. 2004); *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990) ("*PLT*").

Petitioner attempts to manufacture a circuit split by asserting that the "test" from *Continental Oil Co.*

v. London Steam-Ship Owners' Mutual Insurance Ass'n, 417 F.2d 1030 (5th Cir. 1969), is controlling in all OCSLA cases in the Fifth Circuit. *Continental Oil* discusses in dicta a standard for when a state law is "applicable" on the OCS under section 1333(a)(2)(A). *Continental Oil* does not establish the Fifth Circuit's choice-of-law test under section 1333(a)(2)(A) in non-maritime cases. Rather, the Fifth Circuit's decision in *PLT*, 895 F.2d at 1047, contains the relevant test used by the Fifth Circuit in OCSLA choice-of-law cases.

Second, the Ninth Circuit did not err in reaching its decision that California minimum wage and overtime laws are surrogate federal law on the oil platforms off the coast of Southern California. The Ninth Circuit correctly concluded that the term "applicable" in section 1333(a)(2)(A), which is not defined, must be read in its ordinary sense, i.e., that "applicable" means "pertains to the subject matter of the dispute." The Ninth Circuit also correctly determined that California minimum wage and overtime laws are "not inconsistent" with the FLSA because the FLSA contains a savings clause, 29 U.S.C. § 218(a), that permits the co-existence of state and other federal laws that provide greater minimum wage and overtime protections than the FLSA. Given that California minimum wage and overtime laws provide such greater protections, there is nothing "inconsistent" between them and the FLSA.

Third, Petitioner misstates the ramifications of the decision below. The overwhelming majority of oil platforms on the OCS are adjacent to the states that comprise the Fifth Circuit. None of those states, however, has minimum wage or overtime laws that exceed, or even differ from, the standards set by the FLSA. OCS oil production in the Ninth Circuit is

limited to the waters off the coasts of Southern California and Alaska. The opinion below will not have a significant impact on the platforms off the Alaska coast because Alaska, like the FLSA, allows for the exclusion of sleeping time from an employee's hours worked under some circumstances. Hence, the primary impact of the opinion below will be with respect to the workers on the roughly 23 oil platforms on the OCS off the coast of Southern California. As a result, the decision below impacts only a tiny fraction of United States offshore platform workers.

Fourth, Petitioner wrongly states, "Employers and employees on the OCS [have held a] shared understanding that the FLSA is the exclusive source of wage-and-hour law on the OCS," and that "employers ... relied for fifty years on the unquestioned proposition that the FLSA is the exclusive source of wage-and-hour law on the OCS." In fact, employers of workers on the OCS have known that California regulated the employment practices on the offshore platforms since at least 2000, when they, together with industry associations that included two of the Petitioner's *amici*, successfully lobbied for an exception to California overtime laws on those platforms. Since then, employers on the OCS, including one represented by the same counsel who represents Petitioner herein, have included language in their collective bargaining agreements and employment contracts explicitly acknowledging that California wage-and-hour laws apply to their operations.

For each of these reasons, the petition should be denied.

STATEMENT

I. Statutory background.

OCSLA extends the laws of the United States to cover the OCS and also adopts thereon all the civil and criminal laws of the adjacent states "[t]o the extent that [such state laws] are applicable and not inconsistent with [OCSLA] or with other Federal laws and regulations of the Secretary...." 43 U.S.C. § 1333(a)(2)(A).[1] Section 1333(a)(2)(A) goes on to provide: "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." *Id.* It concludes, "state taxation laws shall not apply to the outer Continental Shelf." *Id.*

Congress enacted OCSLA to resolve a dispute between "the adjacent states and the Federal Government over territorial jurisdiction and ownership of the [OCS] and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil*, 488 U.S. at 26. In enacting section 1333(a), Congress's "exclusive[] concern" was prohibiting adjacent states from imposing taxes on OCS oil production. *Id.* at 29-30. To accomplish this purpose, OCSLA provides that installations on the OCS are subject to the exclusive jurisdiction and control of the federal government. *Id.* at 27; 43 U.S.C. § 1333(a)(1).

However, Congress did not intend to displace all state law as a substantive matter on the OCS. In enacting section 1333(a)(2)(A), "Congress specifically rejected national uniformity and specifically provided for the application of state remedies." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971), *disapproved of on*

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[1] "Secretary" means Secretary of the Interior. 43 U.S.C. § 1331(b).

other grounds by Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993). As Justice Blackmun later explained:

> [T]he purpose of incorporating state law was to permit actions arising on these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result, regardless of whether the action arose on shelf lands or on neighboring state lands. I would read the statute, thus, to encourage use of state law....

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 489 (1981) (Blackmun, J., concurring). Similarly, *Huson* provides that state laws apply on the OCS pursuant to section 1333(a)(2)(A), because "Congress ... recognized that the special relationship between the men working on these artificial islands and the adjacent shore to which they commute favored application of state law with which these men and their attorneys would be familiar." 404 U.S. at 103 (internal quotation marks omitted).

To harmonize these interests – control over revenues from drilling and enforcement of disputes by the federal government and the continued application of state laws with which the persons working on the OCS would be familiar – the state laws adopted on the OCS become surrogate federal law, but only if they are "not inconsistent" with other federal laws. *Huson*, 404 U.S. at 102.

In light of these concerns, the accepted interpretation of section 1333(a)(2)(A) is that the non-taxation civil and criminal laws of the states are

generally incorporated onto platforms on the OCS *unless* they are inconsistent with applicable federal law. *Shell Oil*, 488 U.S. at 25 ("Subsection 1333(a)(2)(A) begins by clarifying which laws will apply to offshore activity on the OCS. *It declares that the civil and criminal laws of the states adjacent to the OCS will apply.* Subsection 1333(a)(2)(A) goes on to create an exception to this general incorporation," i.e., state taxation laws do not apply) (emphasis added); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 217 (1986) ("Within the area covered by OCSLA, federal law controls but the law of the adjacent state is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations."); *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012) ("Section 1333(a)(2)(A) makes the civil and criminal laws of each adjacent state applicable to [drilling platforms on the OCS].' ").

II. Factual background.

Respondent Brian Newton worked for Petitioner on oil platforms permanently affixed to the OCS in the Santa Barbara Channel. Pet. App. 47. His shift lasted 14 consecutive days, and he received pay for only 12 hours each day while on his assigned platform. *Id.* During the 12 uncompensated hours, he was required to remain on the platform but not scheduled to work. *Id.* He could not reasonably leave the platform during any portion of his 14-day shift. *Id.*

III. District court proceedings.

On February 17, 2015, Newton filed his initial complaint against Petitioner in the Superior Court of California. Pet. App. 46. Therein, Newton alleged the following California law causes of action: (1) Minimum Wage Violations (CAL. LAB. CODE §§ 1194,

1194.2, 1197); (2) Paystub Violations (CAL. LAB. CODE § 226); (3) Unfair Competition (CAL. BUS. & PROF. CODE § 17200); (4) Failure to Timely Pay Final Wages (CAL. LAB. CODE §§ 201-203); (5) Failure to Provide Lawful Meal Periods (CAL. LAB. CODE §§ 226.7, 512); and (6) Failure to Pay Overtime and Doubletime Premium Wages (CAL. LAB. CODE § 510). Thereafter, Newton filed a First Amended Complaint adding a seventh cause of action for (7) Civil Penalties under the Private Attorneys General Act of 2004 ("PAGA") (CAL. LAB. CODE §§ 2698-2699.5). Pet. App. 47.

With respect to his overtime and minimum wage claims, Newton alleged that Petitioner failed to pay wages owed for 12 hours each workday in violation of California law. Pet. App. 3.

Petitioner removed the action to the district court pursuant to OCSLA. Pet. App. 4. Petitioner then brought a Motion for Judgment on the Pleadings, which the district court granted without leave to amend. Pet. App. 4-5. The district court held that OCSLA precluded the application of state wage-and-hour laws to offshore oil platforms. Pet. App. 52. The district court, applying a section 1333(a)(2)(A) test it derived from the Fifth Circuit in *Continental Oil*, 417 F.2d 1030, held that California wage-and-hour laws did not *apply* on the OCS because the FLSA was a comprehensive statute that had no "significant voids or gaps" in its coverage that needed to be filled by California law. *Id.* at 54-59. The district court did not address whether these laws were *inconsistent* with the FLSA. Newton appealed.

IV. Ninth Circuit proceedings.

In reversing the district court, the Ninth Circuit articulated a test that is substantially the same as those used by the First and Fifth Circuits for when

state law becomes surrogate federal law under section 1333(a)(2)(A). Pet. App. 15-16. The Ninth Circuit, reading the term "applicable" in its ordinary sense, held that California wage-and-hour laws apply on the oil platforms in federal waters off the California coast. Pet. App. 27. The court went on to hold, after analyzing the content of the potentially applicable state and federal laws and the Congressional intent behind them, that California's minimum wage and overtime laws are "not inconsistent" with the FLSA. Pet. App. 35-39. The Ninth Circuit remanded the case to the district court to consider whether Newton's other California law wage-and-hour claims were inconsistent with federal law. Pet. App. 40.

Petitioner sought *en banc* review by the Ninth Circuit. Not a single judge requested a vote on whether to rehear the matter *en banc*, but the Ninth Circuit amended its original opinion to include a direction to the district court to determine whether to apply its ruling retroactively. Pet. App. 43. Petitioner then filed a motion to stay the mandate; Respondent did not oppose it. The Ninth Circuit issued a short order staying the mandate pending the outcome of the current Petition. Pet. App. 44. Contrary to Petitioner's account, this order does not recognize any circuit split or "far-reaching consequences of its decision." Pet. 3.

REASONS FOR DENYING THE PETITION

I. There is no split of authority.

A. The Circuits to have addressed the question presented are all in agreement.

The test articulated in the decision below for when a state law becomes surrogate federal law under OCSLA is substantially the same as the test the Fifth

Circuit has used since 1990 and the test used by the First Circuit.

The Ninth Circuit's test is as follows:

> Three questions that must be asked in any case involving choice of law under § 1333(a)(2)(A) of the OCSLA. First, the threshold question is whether the situs of the controversy is the OCS. If the situs is not the OCS, the OCSLA's choice of law provision cannot apply. Second, if the situs is the OCS, then we ask whether there is any federal law applicable to the dispute. If there is not, then state law generally applies. Third, if there is federal law applicable to the dispute, then we "must consider the content of both potentially applicable federal and state law" and ask whether any applicable state law is inconsistent with federal law.

Pet. App. 15-16 (quoting *Gulf Offshore*, 453 U.S. at 486).

The test used by the Fifth Circuit is:

> [F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.

PLT, 895 F.2d at 1047.[2]

The test used by the First Circuit is:

> [T]he Massachusetts statutes at issue here are available on the outer Continental Shelf in any event as surrogate federal law, provided they are not inconsistent with other applicable federal law. 43 U.S.C. § 1333(a)(2). So the critical question for this court is not whether Congress gave Massachusetts the authority to regulate on [an installation on the OCS named] Horseshoe Shoals. Rather, we must decide (1) whether the Massachusetts statutes in question apply, by their own terms, to activities on Horseshoe Shoals; and (2) if they do apply, whether their application ... would be inconsistent with federal law.

Cape Wind, 373 F.3d at 194.

Each circuit test requires that the dispute must arise on the OCS, that there is a state law that applies to the subject matter of the dispute, and that the state law must not be inconsistent with any potentially applicable federal law. Because the three circuit tests are substantially the same, there is no circuit split for this Court to resolve.

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[2] State courts in Louisiana and Texas use the *PLT* test too. *See Fontenot v. Sw. Offshore Corp.*, 771 So. 2d 679, 685 (La. Ct. App. 2000); *Diamond Offshore Drilling v. Advanced Indus. & Marine Servs., Inc.*, No. 14-00-00087-CV, 2002 WL 1411068, at *2 (Tex. App. June 27, 2002).

B. *Continental Oil* does not set forth the Fifth Circuit's OCSLA test in non-maritime cases.

Petitioner's claim of a disagreement among the Circuits in premised on the notion *Continental Oil* sets forth the relevant test for determining when a state law becomes surrogate federal law under section 1333(a)(2)(A). It does not. Since 1990, the Fifth Circuit has used the *PLT* test to make such a determination. *See Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 543 F.3d 256, 258 (5th Cir. 2008), *on reh'g en banc*, 589 F.3d 778 (5th Cir. 2009) ("It is well settled that for Louisiana law to apply as surrogate federal law under OCSLA, the three conditions established by this court in [*PLT*] must be met.").[3]

Continental Oil, on the other hand, does not set forth the relevant test because, unlike this case, it is a uniquely maritime decision. State law cannot become surrogate federal law under section 1333(a)(2)(A) when maritime law applies of its own force. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 361 (1969). *Continental Oil* involved a collision between a vessel and a fixed drilling platform on the OCS off the coast of Louisiana, which the court described as "a classic maritime case." 417 F.2d at 1031, 1037. The platform owner filed suit against the

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[3] The Fifth Circuit called the *PLT* test a "misfit" in *In re DEEPWATER HORIZON*, 745 F.3D 157, 166 & n.10 (5th Cir. 2014) because the dispute involved a device that was *temporarily* attached to the OCS. *Id.* at 166. Section 1333(a)(2)(A) does not adopt state law on such temporary structures. *Id.*; 43 U.S.C. § 1333(a)(2)(A). Thus, the *PLT* test may be a "misfit" when section 1333(a)(2)(A) is not implicated, but it is not a misfit where, as here, the injury arose on an OCSLA situs permanently affixed to the OCS. Pet. App. 3 (platforms here were "fixed" to the OCS).

owners of the vessel, asserting claims under Louisiana state law, which the platform owner argued became surrogate federal law under OCSLA. *Id.* at 1033. The Fifth Circuit disagreed, holding that maritime law applied of its own force to the dispute and, as a result, the Louisiana state law could not become surrogate federal law under section 1333(a)(2)(A). *Id.* at 1036.

Subsequent decisions of the Fifth Circuit have confirmed that state law cannot become surrogate federal law under section 1333(a)(2)(A) when maritime law applies of its own force. "[T]his court has declared that where OCSLA and general maritime law both could apply, the case is to be governed by maritime law." *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996). Likewise, under *PLT*'s second requirement, "for adjacent state law to apply as surrogate federal law under OCSLA ... [f]ederal maritime law must not apply of its own force." 895 F.2d at 1047. In this sense, *Continental Oil*'s holding – when maritime law applies of its own force, state law cannot apply under OCSLA – has been subsumed into the second prong of the *PLT* test.

Continental Oil opines that the term "applicable" in section 1333(a)(2)(A) should "be read in terms of necessity – necessity to fill a significant void or gap." 417 F.2d at 1036. Petitioner latches onto this phrase and incorrectly insists that it states the Fifth Circuit's OCSLA choice-of-law "test" for all cases. But *Continental Oil*'s reading of "applicable" is nothing more than dicta outside the context of maritime cases. Where maritime law applies of its own force, it does not matter whether there is a potentially applicable state law, because *Continental Oil* holds that the state

law can never displace maritime law. But where, as here, maritime law does not apply of its own force, a state law can potentially apply, and, as here, does apply. Thus, the standard for when that state law applies in non-maritime cases such as this one is not set by *Continental Oil*; rather, the well-settled standard is set by *PLT*.

Only two other Fifth Circuit decisions, one from 1973 and the other from 1985, have applied the reasoning from *Continental Oil* that certain state laws do not become surrogate federal law under OCSLA because they are not necessary to fill significant gaps in federal law. *See Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973); *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506, 509 (5th Cir. 1985) (per curiam). Both cases, which predate *PLT*, dealt with the potential application of state laws in injury actions arising under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* Although *Nations* and *LeSassier* discussed the potentially applicable state laws in light of *Continental Oil*'s definition of "applicable," their holdings rested instead on the findings that the state laws in question were inconsistent with direct counterparts in the LHWCA. *Nations*, 483 F.2d at 586, 589-590; *LeSassier*, 776 F.2d at 509-510. Indeed, courts in the Fifth Circuit have criticized those cases' reliance on *Continental Oil*'s interpretation of "applicable," because there was no reason to address the applicability of the state laws when they were clearly inconsistent with the LHWCA. *Koesler v. Harvey Applicators, Inc.*, 416 F. Supp. 872, 875, fn. 5 (E.D. La. 1976) ("Since the [LHWCA] clearly prohibits suits against fellow employees, and the [*Nations*] court held that this defense was available to the

insurer, it was not necessary to reach the question whether the [state] statute could apply generally in suits arising on the Outer Continental Shelf.").

Highlighting the fact that the definition of "applicable" in *Continental Oil*, *Nations*, and *LeSassier* is dicta is the fact that the Fifth Circuit has consistently held that a state law can become surrogate federal law on the OCS even when a comprehensive federal statutory scheme would otherwise govern. *See Olsen v. Shell Oil Co.*, 708 F.2d 976, 984 (5th Cir. 1983) (state law permitting award of pre-judgment interest in injury action became surrogate federal law despite the existence and application of federal statute that only permitted an award of post-judgment interest in such actions); *Bartholomew v. CNG Producing Co.*, 832 F.2d 326, 331 (5th Cir. 1987) (same); *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999) (state law providing for comparative negligence in injury actions applied as surrogate federal law because LHWCA did not "express[ly]" address the issue of comparative negligence). Such results would never be possible if the Fifth Circuit, relying on *Continental Oil*, prohibited a state law from applying as surrogate federal law when there is a comprehensive federal statute governing the dispute.

In addition, courts in the Fifth Circuit have recognized that the laws of the adjacent state nearly always apply under OCSLA, a conclusion that would be foreclosed if *Continental Oil* were the governing standard in all cases. *See Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 460 (5th Cir. 1992), *opinion modified on denial of reh'g* (May 29, 1992), *and overruled on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir.

2009) ("As explained in *Rodrigue*, Congress intended that, after the passage of OCSLA, the oil and gas exploration industries would be governed by state law."); *Walter Oil & Gas Corp. v. NS Grp., Inc.*, 867 F. Supp. 549, 553 (S.D. Tex. 1994) ("This Court understands *Rodrigue* to indicate that state law will almost always apply under OCSLA."); *Greer v. Services, Equip. & Eng'g, Inc.*, 593 F. Supp. 1075, 1078 (E.D. Tex. 1984) (interpreting *Rodrigue* to "indicate[] that it will be the exception and not the rule when state law does not apply under OCSLA.").

The final indication that the Fifth Circuit no longer relies on the *Continental Oil* definition of "applicable" outside of maritime cases is that the Fifth Circuit adopted the *PLT* test in 1990, and that test makes no mention of that definition. Instead, *PLT* states that state law *applies* as surrogate federal law when the three requirements are met: an OCS situs, the non-application of maritime law, and non-inconsistency with potentially applicable federal law. 895 F.2d at 1047. This second prong, the non-application of maritime law, may stem from *Continental Oil*'s holding. But, other than the implicit gap left by virtue of the non-application of maritime law on the OCS platforms, the *PLT* test does not require any other type of gap in federal law for a state law to apply in non-maritime cases.

Contrary to Petitioner's contention that the Fifth Circuit uses the *PLT* test only when there is an "unquestioned gap in federal law," Pet. 19, fn. 1, the *PLT* test is the established test in all circumstances involving section 1333(a)(2)(A), including where there are potentially applicable state and federal laws. *See Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487 (5th Cir. 2002); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1528

(5th Cir. 1996), *overruled on other grounds by Grand Isle*, 589 F.3d 778; *Gardes Directional Drilling v. U.S. Turnkey Expl. Co.*, 98 F.3d 860, 866 (5th Cir. 1996).[5] Similarly, there are decisions in the Fifth Circuit that continue to describe section 1333(a)(2)(A) as a "gap filler." *See Tetra Techs., Inc. v. Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016). But these cases do not articulate or use any "test" of applicability under section 1333(a)(2)(A) that is akin to that of *Continental Oil*, nor do they cite or mention *Continental Oil*. Rather, these cases nevertheless use the *PLT* test to determine when a state law is applicable on the OCS. *Tetra Techs.*, 814 F.3d at 738; *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prod. Co.*, 448 F.3d 760, 772, 774 (5th Cir. 2006).

Because *Continental Oil* is not the governing test in the Fifth Circuit for when a state law becomes surrogate federal law under OCSLA in non-maritime cases, Petitioner errs in relying on it here.

II. The Ninth Circuit's decision is correct.

A. California wage-and-hour laws are applicable on the OCS.

Section 1333(a)(2)(A) of OCSLA applies federal law to the OCS "[t]o the extent that [such state laws] are applicable and not inconsistent with [OCSLA] or with

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[5] *Gardes* involved the issue of whether a Louisiana state law was inconsistent with an order from the United States Department of Interior. 98 F.3d at 862, 866-867. The Fifth Circuit used the *PLT* text in this context, holding that the state law did not "subject [the defendant] to conflicting duties" and, therefore, was not inconsistent with the department's order. *Id.* at 866-867. *Gardes* illustrates that, contrary to the assertion of *Amicus* Washington Legal Foundation, the *PLT* test applies even when maritime law is not the only potentially applicable federal law.

other Federal laws and regulations of the Secretary." In addressing whether California wage-and-hour laws applied to the work performed by Newton, the court below considered the definition of the term "applicable" as used in section 1333(a)(2)(A). Pet. App. 21. Although it defines many other terms, OCSLA does not define the term "applicable." *See* 43 U.S.C. § 1331. The court below read "applicable" in its ordinary sense to mean "pertain[s] to the subject matter at hand." Pet. App. 21. The Ninth Circuit, after analyzing the precedent of this Court and the legislative history of OCSLA, rejected Petitioner's argument that "applicable" be read according to the dicta from *Continental Oil*, i.e., a state law is only "applicable" under section 1333(a)(2)(A) if it is necessary to fill a significant void or gap in federal law. App. 22-27.

i. The ordinary meaning of "applicable" is "pertaining to the subject matter at hand."

The Ninth Circuit correctly read "applicable" in its ordinary sense – that it "pertain[s] to the subject matter at hand." This Court directs: "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

ii. The Ninth Circuit's reading of "applicable" is consistent with the precedent of this Court.

In *Huson*, the Court addressed the issue of whether a potentially applicable state statute of limitations was inconsistent with a potentially applicable federal law. 404 U.S. at 102. The Court found that the state statute was "'applicable' in federal court under the Lands Act just as it would be

applicable in a Louisiana court." *Id.* Although *Huson* did not explicitly define the term "applicable," by instead putting the term in quotations, the Court essentially gave it its ordinary meaning. That is, if the law in question were "applicable" in a Louisiana court, meaning that a litigant could bring a claim under that law in that court, then the law would be "applicable" under OCSLA. In this sense, an "applicable" law would be one that pertains to the subject matter at hand, because one can only bring claims in court that are relevant to the subject matter of a dispute.

In *Gulf Offshore*, the Court addressed the "applicable and not inconsistent" language of section 1333(a)(2)(A), also reading "applicable" in an ordinary sense. *Gulf Offshore* provides: "Our first task is to determine the source of law that will govern.... OCSLA, as discussed above, mandates that state laws apply as federal laws '[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws.' 43 U.S.C. § 1333(a)(2). *In any particular case, the adjacent state's law applies* to those areas 'which would be within the area of the state if its boundaries were extended seaward to the outer margin of the [OCS] ....'" 453 U.S. at 485-486 (emphasis added). Again, *Gulf Offshore* does not explicitly define "applicable," but its discussion of section 1333(a)(2)(A) – state law "*applies*" "in any particular case" – highlights the theme that virtually any state law that pertains to the subject matter of a dispute will be generally applicable on the OCS.

Similarly, *Shell Oil* set forth the principle that state law is "general[ly] incorporated" on drilling platforms on the OCS unless there is an exception: "Subsection 1333(a)(2)(A) begins by clarifying which laws will apply to offshore activity on the OCS. *It*

declares that the civil and criminal laws of the states adjacent to the OCS will apply. Subsection 1333(a)(2)(A) goes on to create an exception to this general incorporation." *Shell Oil*, 488 U.S. at 25 (emphasis added). The "exception" it mentions is state *taxation law*, which does not apply. *Id.*; 43 U.S.C. § 1333(a)(2)(A). In other words, the relevant (non-taxation) law of the adjacent state applies under OCSLA unless a federal law ousts it. *Id.*; *Shell Oil*, 488 U.S. at 27-28.

The two OCSLA decisions of this Court since *Shell Oil* – *Tallentire* and *Valladolid* – use the same approach. *See Tallentire*, 477 U.S. at 217 ("Within the area covered by OCSLA, federal law controls but the law of the adjacent state is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations."); *Valladolid*, 565 U.S. at 212 ("Section 1333(a)(2)(A) makes the civil and criminal laws of each adjacent state applicable to [drilling platforms on the OCS].' ").

None of these cases explicitly defines "applicable," but they all treat the requirement in the same way. Any state law that would be applicable in state court can be "applicable" on the OCS. Consequently, by adopting a commonsense definition of "applicable," whereby a state law would be applicable under section 1333(a)(2)(A) if it pertains to the subject matter of the dispute, the Ninth Circuit's reasoning was consistent with the precedent of this Court.

This ordinary reading of "applicable" is also consistent with OCSLA's language itself, where the words "apply," "applicable," and "application" appear numerous times in section 1333 alone. For example, section 1333(a)(2)(A) states that state taxation laws "shall not apply" to the OCS. If Congress had intended

to give the term "apply" or its derivative forms some meaning other than their ordinary definition, it could easily have done so. The statute offers no indication Congress intended these terms to have anything but their ordinary meaning.

iii. Petitioner's reading of "applicable" lacks merit.

Petitioner's suggested interpretation of "applicable," that "'applicable' be read in terms of necessity – necessity to fill a significant void or gap," Pet. 2, is erroneous for at least three reasons. First, as discussed *supra*, this phrase is taken from dicta in *Continental Oil*. 417 F.2d at 1036, which does not apply outside of maritime cases. Second, Petitioner's reading of "applicable" finds no support in the statute itself, as neither "gap" nor "void" appears in the statutory text. Instead, section 1333(a)(2)(A) states that *all* the civil and criminal laws of each adjacent state "are hereby declared to be the law of the United States" on the OCS. 43 U.S.C. § 1333(a)(2)(A). By interpreting the statutory text as requiring a gap or void in a federal statute before a state law may apply, Petitioner ignores the fundamental rule of statutory construction that "the words of a governing text are of paramount concern, and what they convey in their context is what the text means." A. Scalia & B. Gardner, *Reading Law: The Interpretation of Legal Texts* (West 2012) 441. Third, as the Ninth Circuit pointed out in the opinion below, the legislative history from which *Continental Oil* gleaned its take on the meaning of "applicable" is inconclusive, and it would be contrary to the precedent of this Court to craft a rule of law from ambiguous legislative history. *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

The Ninth Circuit's definition of "applicable," which it measured against the statutory text and the precedent of this Court, was therefore correct.

Petitioner, arguing that the Ninth Circuit's conclusion was incorrect, and that a state law can only be "applicable" under section 1333(a)(2)(A) if such a law is necessary to fill a void or gap in federal law, points to the use of the term "gap" in *Rodrigue*, 395 U.S. at 357. But the term "gap" appears only once in *Rodrigue* and in a much different context than Petitioner suggests. In *Rodrigue*, there was no potentially applicable federal law *other than maritime law*. Yet maritime law did not apply to the drilling platforms under OCSLA, which left a "gap" in federal law that could be filled by the adjacent state's laws. Subsequent decisions of this Court acknowledge that *Rodrigue* used "gap" in this sense, a point that was not lost on the Ninth Circuit in the opinion below. *See Huson*, 404 U.S. at 101 ("In *Rodrigue*, we clarified the scope of application of federal law and state law under § 1333(a)(1) and § 1333(a)(2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognized that there exists a substantial 'gap' in federal law."); Pet. App. 27.

Huson also uses the term "gap" in its analysis of whether state law becomes surrogate federal law under OCSLA. *Huson* simply holds that a potentially applicable state law is not ousted by a potentially applicable federal common law and, in such a situation, the state law becomes surrogate federal law under OCSLA. 404 U.S. at 104-105. Contrary to Petitioner's assertion, *Huson* does not address the issue of how a court must assess whether there are potentially applicable state and federal statutory schemes or whether there must be a literal "gap" in

the federal statutory scheme in order for a potentially applicable state law to apply. Thus, *Huson*'s use of the term "gap" is of little assistance here.

No decision of this Court has required a significant void or gap in federal law before the law of the adjacent state may become applicable. And a holistic reading of section 1333(a)(2)(A), which takes into account the final sentence regarding the non-application of state taxation laws, leads to the conclusion that *all* non-taxation state laws are generally incorporated on the OCS, but only to the extent they are not inconsistent with potentially applicable federal law. *Shell Oil*, 488 U.S. at 25.[6] The decision below properly read the statute in this way when it concluded that California wage-and-hour laws apply on the OCS platforms off the Southern California coast. Pet. App. 10, 21.

B. California minimum wage and overtime laws are not inconsistent with federal law.

i. The Ninth Circuit applied the correct legal standard.

Having correctly determined that California wage-and-hour laws are "applicable" under section 1333(a)(2)(A), the Ninth Circuit also correctly held that California minimum wage and overtime laws are

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[6] By arguing that the Ninth Circuit's definition of "applicable" renders it superfluous, Pet. 28, Petitioner ignores this final sentence of section 1333(a)(2)(A) regarding the non-applicability of state taxation laws. Read as a whole, the "applicable and not inconsistent" language makes sense: all "applicable and not inconsistent" state laws become surrogate federal law on the OCS, but state *taxation* laws can never be applicable, regardless of whether they are consistent with federal laws.

"not inconsistent" with federal law. The Ninth Circuit, examining OCSLA precedent of this Court and cases that have arisen in the context of other statutes involving the incorporation of state law into federal law, "glean[ed] ... the principle that inconsistency between state and federal law is assessed by looking at Congress's objective in enacting the federal statutes at issue." Pet. App. 35.

This conclusion as to how to assess the inconsistency between potentially applicable state and federal laws under section 1333(a)(2)(A) is harmonious with the precedent of this Court. In *Gulf Offshore*, the Court faced the question of whether a state law jury instruction should have been given in a case arising on the OCS when there was a potentially applicable federal law jury instruction to the contrary. 453 U.S. at 485. After discussing the rule that, "in any particular case, the adjacent state's law applies" on the OCS, the Court turned to the issue of how to determine whether the state law was inconsistent with federal law: "To apply the statutory directive a court must consider the content of both potentially applicable federal and state law." *Id.* at 486.

Here, the Ninth Circuit complied with *Gulf Offshore*'s mandate by considering the content of the potentially available state and federal laws. Pet. App. 35-39. The opinion below additionally addressed Congress's objective in enacting the statutes at issue. *Id.* The Ninth Circuit correctly concluded that California minimum wage and overtime laws are not inconsistent with federal law under section 1333(a)(2)(A) because the federal law in question, the FLSA, specifically allows states, via its savings clause, to provide greater minimum wage and overtime protections than those set forth in the FLSA.

Pet. App. 35-36. The Ninth Circuit also correctly concluded that the importation of California minimum wage and overtime laws as federal law on the OCS serves the purpose of OCSLA. Pet. App. 36-38.

ii. Petitioner misconstrues the FLSA savings clause.

Petitioner first argues that Newton's wage-and-hour claims are inconsistent with the FLSA because "each of the state-law provisions that Newton invokes has an FLSA counterpart that regulates the same topic in a different way." Pet. 33. This argument lacks merit. The FLSA sets minimum standards for the national minimum wage and overtime hours worked. 29 U.S.C. §§ 206, 207(a)(1). In addition, the FLSA savings clause enables states, municipalities, and other federal laws to establish more favorable minimum wage and overtime legislation. *Id.* at § 218(a). The savings clause states, in relevant part: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter." *Id.*

With respect to minimum wage and overtime protections, the FLSA savings clause explicitly allows states to impose higher standards. It matters not that the state law claims here may "regulate[] the same topic in a different way" as certain provisions of the FSLA. Pet. App. 32. Rather, what matters is whether the California laws provide greater protection than their FLSA counterparts. California's minimum wage and overtime laws do provide greater protections than

their counterparts in the FLSA. CAL. LAB. CODE §§ 510, 1182.12, 1194, 1194.2; *cf.* 29 U.S.C. §§ 206, 207(a)(1). Because the savings clause permits such greater protections, the California laws are not inconsistent with the FLSA.

With respect to Respondent's other California law claims, the district court never addressed whether they were inconsistent with the FLSA, and the Ninth Circuit remanded that issue to the district court, Pet. App. 40, leaving nothing for this Court to review. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court ... is one of final review, 'not of first view.'" (citation omitted)). In any event, nothing in the FLSA mandates or prohibits the conduct regulated by the California statutes at issue here.

iii. The FLSA savings clause even applies when there are competing federal laws.

As to Petitioner's other argument, that the savings clause does not apply when there are two inconsistent *federal* statutes, Pet. 33-34, Petitioner simply ignores the plain language of the savings clause. The savings clause expressly permits other state *or federal* laws to establish greater minimum wage or overtime protections than the FLSA. 29 U.S.C. § 218(a). This Court has rejected the argument that dueling *federal* wage-and-hour statutes could not co-exist, because the FLSA savings clause expressly permits such co-existence. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519-520 (1950). Here, Petitioner admits that it could comply with the California-as-federal-law and FLSA standards. Pet. 34. Given that Petitioner can comply with both *federal* regimes, there is nothing stopping both such regimes from co-existing on the OCS.

iv. Applying California minimum wage and overtime laws to platforms on the OCS is not contrary to OCSLA's purposes.

Finally, the Ninth Circuit's decision is *not* "contrary to the distinctive regime that Congress established for the OCS." Pet. 34. Congress's "exclusive concern" in enacting OCSLA was the protection of revenues derived from drilling on the OCS. *Shell Oil*, 488 U.S. at 29-30. Moreover, OCSLA provides a way for federal enforcement of all laws that apply on the OCS. *Rodrigue*, 395 U.S. at 365. And, in enacting OCSLA, "Congress specifically rejected national uniformity and specifically provided for the application of state remedies." *Huson*, 404 U.S. at 104. Allowing certain non-inconsistent state laws to apply as federal law on the platforms does not contravene these purposes, since OCSLA nevertheless still prohibits state taxation laws and gives federal authorities jurisdiction and enforcement rights over all disputes, whether they arise under state or federal law.

III. Petitioner vastly overstates the impact of the decision below.

The U.S. offshore oil industry is almost entirely limited to the borders of the Ninth and Fifth Circuits. In the Ninth Circuit, oil production on the OCS is almost exclusively performed off the coast of Southern California, where there are 23 platforms in federal waters. *See* U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program*, p. 4-1 (Jan 2018).[7] In the Fifth Circuit, oil

[7] *Available at* https://www.boem.gov/NP-Draft-Proposed-

production on the OCS is spread evenly off the coastlines of Texas, Louisiana and Mississippi, in the Gulf of Mexico, where there are thousands of platforms. *See* U.S. Dep't of the Interior Minerals Mgmt. Serv., *Forecasting the Number of Offshore Platforms on the Gulf of Mexico OCS to the Year 2023*, pp. 1-4 (Apr. 2001).[8]

The opinion below will impact only OCS platform operations adjacent to states with minimum wage and overtime laws that provide greater protection from those provided by federal law. The states that comprise the Fifth Circuit do not have state minimum wage or overtime protections that differ from the FLSA, nor does Alabama, the one state in the Eleventh Circuit that has drilling off its coast. *See* U.S. Dep't of Labor, *Minimum Wage Laws in the States*.[9] Thus, the decision here will have no impact with respect to wage-and-hour issues in the Gulf of Mexico, where the overwhelming majority of OCS platform workers perform their jobs.

In the Ninth Circuit, the only state other than California that has drilling platforms on the OCS is Alaska. Alaska has a minimum wage that exceeds the FLSA standard, *see* ALASKA STAT. § 23.10.065, and requires overtime premiums to be paid for hours worked in excess of 40 hours in a workweek and eight hours in a workday (as opposed to the FLSA standard, which only requires overtime payments for hours worked in excess of 40 hours in a workweek), *see* ALASKA STAT. § 23.10.060. But the opinion below will

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[8] *Available at* https://www.boem.gov/ESPIS/3/3104.pdf

[9] *Available at* https://www.dol.gov/whd/minwage/america.htm

not have a significant impact on the platforms off the Alaska coast because Alaska allows for the exclusion of sleeping time from an employee's hours worked under some circumstances. *See* ALASKA ADMIN. CODE, tit. 8, § 15.105 (incorporating U.S. Department of Labor regulations, including 29 C.F.R. § 785.23, that include guidelines for determining compensable hours, including hours spent sleeping).

Meanwhile, even California's offshore oil industry is extremely limited in size. Of the 23 platforms in federal waters off the coast of Southern California, several have been non-operational since 2016 and at least one is set to be decommissioned in the next few years. The number of workers on those platforms likely is fewer than 1,000.[10]

Even so, Petitioner and its fellow employers on those platforms off the California coast can retain 12-hour shifts and minimize their exposure to overtime liability if their employees elect to have alternative

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[10] Petitioner points to *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2016), *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014), and *Christopher v. SmithKlien Beecham*, 567 U.S. 142 (2012) as examples where this Court has reversed Ninth Circuit FLSA decisions. Each of those cases had nationwide implications. This case is a minnow by comparison. *Encino Motorcars* impacted an estimated 100,000 automobile dealership service advisors. Brief for Nat'l Auto. Dealers Ass'n et al. as *Amici Curiae* on Petition for Writ of Certiorari in *Encino Motorcars, LLC v. Navarro*, No. 16-1362 at 5. *Busk*'s holding impacted every hourly employee in the country who spent time undergoing security screenings at the conclusion of their shift. *Busk*, 135 S. Ct. at 519. *Christopher* affected 90,000 pharmaceutical sales representatives. Brief for Pharmaceutical Research and Manufacturers of America as *Amicus Curiae* on Petition for Writ of Certiorari in *Christopher v. SmithKlien Beecham*, No. 11-204 at 4-5. This case impacts likely fewer than 1,000 workers off a stretch of coast no more than 200 miles long.

workweek schedules. *See* CAL. CODE REGS., tit. 8, § 11160(3)(B)(1)(h).

In short, Petitioner and its *amici* have not shown and cannot show that the decision below will impact employment conditions anywhere but for a small sliver of the Southern California coastline, making certiorari inappropriate.

IV. Employers have long acknowledged that California wage-and-hour laws apply on the platforms off its coast.

Perhaps the single largest misstatement of fact made by Petitioner and its *amici* is that the decision below "disrupts longstanding relationships among employers and employees on the OCS, who have negotiated mutually beneficial compensation plans in good faith-reliance on the shared understanding that the FLSA was the exclusive source of wage-and-hour law on the OCS." Pet. 12. Petitioner and the *amici* assert (without any evidentiary support) that employers on the OCS have believed for *50 years* that they only had to comply with the FLSA. Pet. 21-22. Not true.

A. Legislative history shows that the offshore drilling industry knew California law applied to OCS platforms since 1999.

In 1999, California enacted Assembly Bill 60 ("AB 60"). AB 60, among other things, "established a new statutory scheme governing hours of labor and overtime compensation for *all* industries and occupations." *Collins v. Overnite Transp. Co.*, 105 Cal. App. 4th 171, 176 (2003), *as modified* (Feb. 3, 2003) (emphasis in the original). In January 2001, by the promulgation of Wage Order 16-2001 pursuant to AB

60,[11] the California Industrial Welfare Commission ("IWC") began to regulate the drilling industry "for the first time." *Id.*

Between the passing of AB 60 and the promulgation of Wage Order 16-2001, the IWC held public hearings concerning the issues raised by AB 60. *Small*, 148 Cal. App. 4th at 230. Testifying at these public hearings were employers of platform workers on the OCS off Southern California and their trade organizations, even including some of the *amici*, who acknowledged AB 60's application to their industry. *See* Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Nov. 15, 1999) at 8-22[12] (testimony of *Amicus* California Independent Petroleum Association ("CIPA") seeking non-retroactive application of AB 60 to the offshore drilling industry); Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Dec. 15, 1999) at 129-129, 135[13] (representative of offshore drilling company Venoco told directly by chairman of IWC that AB 60 applied to offshore drilling industry; CIPA present at hearing). It is therefore inaccurate to now state that the industry historically believed that only the FLSA applied; the industry was on notice that California overtime laws applied offshore as early as 1999.

At that same time, recognizing that California overtime laws applied to the OCS platforms, the industry also took efforts to curb the impact of AB 60.

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[11] Wage Order 16-2001 regulates employees in the construction, drilling, logging, and mining industries. CAL. CODE REGS., tit. 8, § 11160(1).

[12] *Available at* https://www.dir.ca.gov/iwc/PUBMTG111599.pdf.

[13] *Available at* https://www.dir.ca.gov/iwc/PublicMeeting121599.pdf

In 2000, industry representatives lobbied the IWC to adopt an alternative workweek schedule ("AWS") for offshore platform workers and their counterparts onshore. *See* Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Oct. 5, 2000)[18] (testimony of representatives from *Amicus* Western States Petroleum Association ("WSPA") and company operating 12 platforms off Southern California urging the IWC to adopt same AWS for land-based facilities connected to the offshore operations as had been adopted for offshore platforms).[21]

The IWC agreed, and in Wage Order 16-2001 it adopted the same 12-hour-day AWS for onshore and offshore workers: "[F]or employees working in *offshore* oil and gas production, drilling, and servicing occupations, as well as for employees working in onshore oil and gas separation occupations directly servicing offshore operations, an alternative workweek schedule may authorize work by the affected employees of no longer than 12 hours per day within a 40 hour workweek without the payment to the affected employees of an overtime rate of compensation." CAL. CODE REGS., tit. 8, § 11160(3)(b)(h) (emphasis added).[22] Given that the oil

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[18] *Available at* https://www.dir.ca.gov/iwc/PUBHRGo5.htm.

[21] This testimony refutes the arguments of Petitioner and its *amici* that there must be continuity of wage-and-hour laws between the workers off the California coast and workers in the Gulf of Mexico. Pet. 20. Rather, it is more important to have the offshore workers paid the same way as their onshore counterparts, because they work as a single unit and cannot be disengaged operationally.

[22] *See also* Indus. Welfare Comm'n, *Stmt. as to the Basis for Wage Order No. 16*, § 3: Hours and Days of Work, https://www.dir.ca.gov/iwc/StatementAsToTheBasisWageorder1

industry acknowledged the application of California overtime laws to its offshore drilling facilities and specifically lobbied for an AWS to reduce the impact of those laws after the passage of AB 60 in 1999, Petitioner and its *amici*, especially those *amici* who testified at the public hearings, cannot now assert that the *Newton* decision upended the industry's long-held belief that California wage-and-hour laws did not apply on the platforms.

B. OCS Employers' labor contracts contradict Petitioner's argument that only FLSA applies on OCS platforms.

Petitioner's argument that, until *Newton*, operators believed only the FLSA applied on the OCS platforms is also contradicted by the fact that most of these operators – including several who share the same counsel as Petitioner – have entered into contracts with their employees or their unions that either explicitly state that California wage-and-hour laws apply on the platforms or contain provisions that mirror those same California laws. *See* Answering Br., *Curtis v. Irwin Indus., Inc.*, No. 16-56515, ECF No. 40 at 15, 18, 19 (9th Cir. Feb. 23, 2018) (Irwin Industries' CBA, which is applicable to employees on 14 of the 23 oil platforms in federal waters off the California coast, states, "The parties to this Agreement recognize and agree that Industrial Wage Order 16-2001 covers

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6.htm (last visited Nov. 12, 2018) ("The IWC received testimony and correspondence from employees, employers, and representatives in the drilling industry regarding alternative workweeks. Citing personal preference, family care, commuter traffic, transportation to and from offshore rigs, and mental and physical well-being, the vast majority of testimony urged the adoption of an alternative workweek permitting 12-hour days without the payment of overtime.").

[Irwin's] operation and recognize the applicability of and incorporate the provisions of Industrial Wage Order 16-2001 ... to work performed under this Agreement.");[23] Employment Agreement, *Jensen v. Safety Equip. Corp.*, No. 2:18-cv-02890-RGK-GJS, ECF No. 28-12 at 1-4 (C.D. Cal. Jul. 5, 2018) (employment agreement for work on platforms in federal waters states, "This Agreement includes ... the duties imposed on employees by law pursuant to the California Labor Code, all of which are incorporated herein by reference."); Collective Bargaining Agreement, *Williams v. Brinderson Constructors, Inc.*, No. 2:15-cv-02474-MWF-AGR, ECF No. 20-1 at 9 (C.D. Cal. May 22, 2015) (stating, "Employees are entitled to unpaid meal periods in accordance with California law and Company policy," and expressly incorporating Wage Order 16-2001 into its terms).

These documents, publicly available on PACER, flatly contradict the statement by Petitioner and its *amici* that platform operators only believed they were subject to the FLSA. Petitioner and its *amici*, on the other hand, cite to no evidence in support of their argument, further demonstrating that the Petition is misleading, lacks merit, and should be denied.

Finally, Petitioner and its *amici* argue that the decision below could impose massive retroactive liability. But the court of appeals did not make a ruling as to retroactivity, leaving that issue for the district court to address in the first instance. Pet. App. 43. This Court should not grant review because of a

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[23] Counsel of record who signed the Answering Brief on behalf of Irwin Industries also represents the within Petitioner.

retroactivity concern when the lower courts have yet to address the issue.

CONCLUSION

The petition or a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. STRAUSS
Counsel of Record
ARIS E. KARAKALOS
STRAUSS & STRAUSS, APC
121 North Fir Street, Ste F
Ventura, California 93001
(805) 641-6000
mike@strausslawyers.com

Counsel for Respondent

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